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Supreme Court, U.S.
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SUPREME COURT OF THE UNITED STATES

Ching-tsen Bien,

Petitioner,

v.

Elaine Chao, Secretary of Labor

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

Petition For A Writ Of Certiorari

Mr. Ching-tsen Bien
1855 West Queens Court
Crofton, Maryland 21114
410-721-3468
Pro Se

15 pp

QUESTIONS PRESENTED

1. Can a 42 U.S.C. 1981a(c) requested jury trial in a case of intentional discrimination in employment be taken from the Plaintiff on the basis of an un-transcribed telephone hearing from which the Judge concludes that the monetary damages requested was solely for back pay even though [a] the Plaintiff never said that the amount of damages requested was solely for back pay, [b] his complaint states the $200,000 was for compensation, [c] his counsel informed the court that back pay was a consideration in calculating the amount requested, along with other considerations like loss of consortium, stress, etc., [d] testimony was elicited and provided by Plaintiff on his stress and loss of consortium due to the discrimination, and [e] Respondent's motion in opposition to Petitioner's jury trial did not present the source of the requested damages as a basis for its motion?

2. Following the deprivation of Petitioner's 42 U.S.C. 1981a(c) jury trial, does the Judge's findings stand?

LIST OF PARTIES

Petitioner is an individual. He is a former employee of the Respondent and the agency's respiratory expert. He is of Chinese descent.

Respondent is Elaine Chao, Secretary of Labor, representing the Department of Labor.

TABLE OF CONTENTS

Page

Questions Presented for Review..... i

List of Parties..... ii

Table of Contents..... iii

Table of Authorities..... iv

Table of Appendices..... v

Opinions Below..... 1

Concise Statement of Basis for Jurisdiction.....1

Constitutional and Statutory Provisions Involved..... 1

Concise Statement of the Case..... 2

Concise Argument of Reasons for Allowance of Writ..... 3

TABLE OF AUTHORITIES

Cases

Anderson v. Bessemer City, 470 U.S. 564 (1985).....4

Bowden v. United States of America, No. 98-5146 (D.C. Cir.1999).....2

Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987).....4

Statute

Civil Rights Act of 1991, 42 U.S.C. 1981a(c)....1

TABLE OF APPENDICES

Appendix A — Order of the United States Court of Appeals for the District of Columbia Circuit Denying Petition for Rehearing En Banc

Appendix B — Order of the United States Court of Appeals for the District of Columbia Circuit

Appendix C — Opinion of the United States District Court for the District of Columbia

Appendix D — Petitioner/Plaintiff's Findings of Fact And Conclusions of Law, along with Attorney's Fees Incurred.

OPINIONS BELOW

The *Per Curiam* orders of the United States Court of Appeals for the District of Columbia Circuit [a] affirming Respondent's motion for summary affirmance and [b] denying Petitioner's petition for rehearing en banc are attached as appendices "A" and "B" respectively.

The United States District Court for the District of Columbia's "Findings of Fact and Conclusion of Law" against the Petitioner is attached as appendix "C".

BASIS FOR JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit (hereinafter "USCADCC"), affirming Respondent's motion for summary affirmance, was entered on March 16, 2001. The USCADCC also denied Petitioner's petition for rehearing en banc on June 14, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Civil Rights Act of 1991, 42 U.S.C. 1981a(c).

The Civil Rights Act of 1991, 42 U.S.C. 1981a(c), states in pertinent part:

> ***1981a.*** ***Damages in cases of intentional discrimination in employment***
>
> *(c)* ***Jury trial.*** *If a complaining party seeks compensatory or punitive damages under this section --*
> *(1) any party may demand a trial by jury; and*
> *(2) the court shall not inform the jury of the limitations described in subsection (b)(3).*

STATEMENT OF THE CASE

On March 21, 1997, Petitioner filed a federal lawsuit against the Department of Labor on the basis of reprisal for making charges of employment discrimination (42 U.S.C. 2000e, et seq.). Fourteen days before the scheduled jury trial on June 28, 1999, Respondent filed a motion opposing a jury trial on the basis of Bowden v. United States of America, No. 98-5146, i.e., the dispute was really a breach of contract (i.e., disobeying the settlement agreement), not intentional discrimination. Petitioner adamantly opposed it, and a telephone conference was held.

The Magistrate Judge ruled, in substance, that since Petitioner's requested damages represent back pay, he is not entitled to a jury trial (a basis never presented by Respondent). Thereafter, the trial commenced on June 28, 1999 before the judge. On July 20, 2000, the court rendered a judgment against Petitioner.

Petitioner filed his Notice of Appeal with the United States Court of Appeals for the District of Columbia Circuit on August 14, 2000. Respondent made a motion for summary affirmance. Petitioner filed opposition to the motion. On March 16, 2001, the motion for summary affirmance was granted.

Petitioner filed a petition for rehearing en banc on April 27, 2001. It was denied on June 14, 2001.

REASONS FOR ALLOWANCE OF WRIT

Jury Trial Taken

On page 4 of the Magistrate Judge's Memorandum Order, it is stated as follows, "When asked by this Court in a telephone hearing conducted on June 25, 1999 to state precisely, on the record, what the $200,000 claim represented, Plaintiff's attorney indicated that that amount constituted the amount of back pay that Plaintiff seeks." The appeals court upheld this decision, and consequently,

the summary dismissal of Petitioner's appeal.

The offence to the civil rights law is revealed in the following question: What does the Magistrate Judge mean by "Plaintiff's attorney indicated ...."? If he means that the representation made was that back pay was used as a consideration in reaching the total amount requested, that is correct. However, that does not equate to making back pay the sole reason for the $200,000 requested. For example, the stress and loss of consortium experienced by Petitioner was addressed during the trial. Pages 100 and 101 of the trial transcript show Petitioner addressing this stress from the discrimination. Page 90 of the trial transcript show Respondent (in closing argument) acknowledging Petitioner's pre-trial testimony (which was later incorporated in the trial record [Tr., pg. 150, lines 6-15, June 30, 1999]) regarding his loss of consortium via stress-related marital problems. Page 100 of the trial transcript again shows Petitioner addressing how stress from retaliation and discrimination forced him to retire. Therefore, to deprive the Petitioner of his jury trial and force him before a judge deprived him of a statutory right granted to him by the Civil Rights Act of 1991. To have such taken from him warrants a reversal of the District Court's finding in this case. Moreover, when a fact is this crucial and controverted, Anderson v. Bessemer City, 470 U.S. 564, 575 (1985) calls for a review of the entire

record in order that the appellate court can determine if there is such internal inconsistency "that a reasonable fact-finder would not credit it." Id. at 575

More problematic is the fact that the District of Columbia Circuit did not honor its own case law. Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294 (D.C. Cir. 1987) informed us that the "court is now obligated to view the record and the inferences to be drawn therefrom in the light most favorable to" the non-moving party. Id. at 298. The Magistrate Judge's use of the word "indicated" is unclear and certainly does not negate the other non-economic factors that Petitioner considered in determining how much to request in compensatory damages. This fact alone bars taking Petitioner's jury trial from him. Moreover, no transcript of the telephone hearing exist to Petitioner's knowledge. Such would support Petitioner's position that it has never been maintained that he relied solely on back pay in determining his damages. With testimony addressing Petitioner's stress and loss of consortium, inferences in the light most favorable to Petitioner warrant [i] a reversal of the district court, [ii] a new trial for Petitioner, and [iii] the attorney's fees incurred as outlined in Appendix "D" (so that Petitioner is not burdened with paying twice for the one jury trial he properly requested).

Imposed Judge's Findings

The findings by the Judge were so unbelievable that their offence to the civil rights law is best highlighted by [a] Petitioner's findings of fact and conclusions of law filed with the district court as directed by the Judge (Appendix "D"), [b] the EEOC's finding of discrimination against Respondent (Appendix "E," page 4, paragraph 13), and [c] the crucial fact that Respondent did not present one witness in his case in chief.

CONCLUSION

Finally, this court should allow the writ since permitting a Judge to take a Plaintiff's statutorily requested jury trial on the basis of an un-transcribed telephone hearing (in the middle of formal litigation) from which the Judge believes something was "indicated" sets a precedent that erodes the Civil Rights Act.

For all the aforementioned reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ching-tsen Li

Mr. Ching-tsen Bien
1855 West Queens Court

Crofton, Maryland 21114
410-721-3468

Pro se

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of November, 2001, the required number of the aforegoing petition for writ of certiorari was mailed first class, postage prepaid, to [a] Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Ave., N.W., Washington, D.C. 20530-0001 and [b] Alexander D. Shoaibi, Assistant United States Attorney representing the Department of Labor, 555 4th Street, N.W., 10th Floor, Judiciary Center Bldg., Washington, D.C. 20001.

Ching-tsen Bien

Mr. Ching-tsen Bien

Pro se

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 00-5287	*	**September Term,**
Ching-tsen Bien,	*	**2000**
	*	
Appellant	*	
	*	**97cv00572**
v.	*	
	*	
Elaine Chao, Secretary	*	
of Labor,	*	
	*	
Appellee.	*	

* *

Before: Williams, Henderson, and Randolph, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, the response thereto, and the reply; and the cross motion for summary reversal, the response thereto (contained in appellee's reply in support of summary affirmance), and appellant's reply, it is

ORDERED that the motion for summary

reversal be denied and the motion for summary affirmance be granted substantially for the reasons stated by the magistrate judge in the Findings of Fact and Conclusions of Law filed July 20, 2000. The merits of the parties' positions are so clear as to warrant summary action. See Taxpayers Watchdog, Inc. v. Stanley, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); Walker v. Washington, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), cert. denied, 449 U.S. 994 (1980). The findings of fact are not clearly erroneous, see Fed.R.Civ.P. 52(a); Anderson v. Bessemer City, 470 U.S. 564, 573-76 (1985), and the conclusions of law based on those findings are clearly correct.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing or petition for rehearing en banc. See. Fed.R.App.P. 41(b); D.C. Cir. Rule 41.

Per Curiam

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 00-5287	*	**September Term,**
Ching-tsen Bien,	*	**2000**
	*	
Appellant	*	
	*	**97cv00572**
v.	*	
	*	
Elaine Chao, Secretary	*	
of Labor,	*	
	*	
Appellee.	*	

* *

Before: Edwards, Chief Judge; Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: *Signature on Original*
Robert A. Bonner
Deputy Clerk

APPENDIX C

United States District Court for the District of Columbia

Ching-tsen Bien,	*	**Civil Action No.**
	*	
Plaintiff,	*	**97-572 (AK)**
	*	
v.	*	
	*	
Alexis Herman,	*	
Secretary, Dept.	*	
of Labor,	*	
	*	
Defendant.	*	

* *

ORDER OF JUDGMENT

In accordance with the Findings of Fact and Conclusions of Law entered on July 20, 2000, it is

ORDERED that judgment be, and the same hereby is, entered in favor of the Defendant, Alexis Herman, Secretary, Department of Labor.

DATED: July 20, 2000 *Signature On Original*
Alan Kay
United States Magistrate Judge

United States District Court for the District of Columbia

Ching-tsen Bien,	*	**Civil Action No.**
	*	
Plaintiff,	*	**97-0572 (AK)**
	*	
v.	*	
	*	
Alexis Herman,	*	
Secretary, Dept.	*	
of Labor,	*	
	*	
Defendant.	*	

* *

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiff, Ching-Tsen Bien sued his former employer, Department of Labor (DOL), claiming impermissible retaliation in violation of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000-e et seq. Specifically, Plaintiff alleges that the Department of Labor and Plaintiff entered into a Settlement Agreement and Stipulation of Dismissal on March 18, 1993 that promoted him from a GS-14 Industrial Hygienist to a Grade GM-15 Supervisory Industrial Hygienist (Deputy Director, Office of Science and Technology Assessment). Plaintiff further alleges that the GM-15 position to which he

was appointed included supervisory responsibilities and that Defendant impermissibly removed those supervisory duties in retaliation for his prior Equal Employment Oportunity Commission (EEOC) complaints of discrimination. The parties consented to trial by a Magistrate Judge pursuant to 28 U.S.C. 636 (c) and Local Rule 72.2.

I. Preliminary Statement

In 1991, Plaintiff Ching-Tsen Bien (Mr. Bien") filed an employment discrimination suit in this Court (Ching-Tsen Bien v. Lynn Martin, CA 91-2597), claiming that Defendant violated his rights under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-3a. Plaintiff alleged that DOL's decision not to promote him to the position of Director of the Office of Science and Technology Assessment was based on race and national origin. On February 26, 1993, the last business day before the March 1, 1993 trial date, the parties agreed to settle the case. The Settlement Agreement provided, *inter alia,* that Mr. Bien would receive a grade enhancement from GS-14 to GM-15 with the title of Supervisory Industrial Hygienist (Deputy Director, Office of Science and Technology Assessment), and a lump sum payment of $30,000. Three months after the Settlement Agreement had been implemented, Mr. Bien filed an administrative complaint alleging retaliation by Defendant. The retaliation, according to Plaintiff, was the removal of "all supervisory

authority from Plaintiff's Court Ordered Supervisory Industrial Hygienist position." Complaint, 6

Following an investigation of Plaintiff's EEO complaint, the agency concluded that no discrimination had occurred. Mr. Bien appealed to the EEOC which affirmed the agency's finding of no discrimination. On March 31, 1997, Plaintiff filed the above-captioned Complaint in this Court, alleging that following his appointment to the position of Supervisory Industrial Hygienist, Deputy Director, Office of Science and Technology Assessment, the Defendant's failure to give him supervisory authority constituted retaliatory conduct in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000-e et seq. and circumvented the Settlement Agreement. Plaintiff further claims that the actions of Defendant caused him to retire earlier than he wanted to.

In his Complaint, Plaintiff seeks the following releif: (1) that he be reinstated to the position he held when he retired; (2) that he be given full supervisory authority and managerial decision making; (3) that he be permitted to stay in that position for the time period provided in the Settlement Agreement; (4) that his pension benefits be adjusted to reflect the additional period of employment; (5) that he be awarded $200,000 in back pay; and (6) that he be awarded statutory attorney's fees.

The case was tried as a bench trial by the undersigned Magistrate Judge with the consent of the parties. The Plaintiff called the following witnesses: Ching-Tsen Bien, Patricia K. Clark, Patricia Saturen, Stephen J. Mallinger, Juanita Jones, henry C. Woodcock, and Macarthur Cheeks, and the Defendant called Mark Nagle and Mona Lyons as witnesses. The trial focused on the events leading up to the negotiations culminating in a Settlement Agreement signed by the parties on March 18, 1993 and the events following Plaintiff's receipt of his appointment to the GM-15 position.

Having heard the testimony of the witnesses and reviewing the exhibits admitted into evidence at trial, pursuant to Federal Rule of Civil Procedure 52, the Court makes the following findings of fact and conclusions of law.

II. Findings of Fact

A. Background

1. Plaintiff, Ching-Tsen Bien, had been an employee of Department of Labor in its Occupational Safety and health Administration (OSHA) division since 1972. Mr. Bien is an Industrial Hygienist with a Bachelors Degree and a Masters Degree in Chemical Engineering and a Masters Degree in Industrial Hygiene. He has published several papers and co-authored a book on respiratory protection. Tr. 26

(Day 2). He was considered to be one of the leading experts in respiratory protection in the DOL. Tr. 130 (Day 3) and Tr. 104 (Day 2).

2. In 1987, Mr. Bien applied for but was unsuccessful in obtaining the position of Director of the Office of Science and Technology Assessment (OSTA). Tr. 42 (Day 2). In 1991, he filed an employment discrimination action, Ching-Tsen Bien v. Lynn Martin, CA 91-2597, alleging that Defendant's failure to promote him was based on race and national origin. Mr. Bien was represented by Mona Lyons, Esq. and Defendant was represented by Assistant United States Attorney (AUSA) Mark Nagle and Mr. willie Alexander, an attorney in the Solicitor's Office of the Department of Labor. In the fall of 1992, attempts to settle the case were unsuccessful principally because Plaintiff insisted on being appointed to a Grade 15 position that entailed supervising and managing persennel within the division. Defendant refused to offer by way of settlement any position that involved Mr. Bien exercising supervisory authority. Tr. 29 (Day 1).

3. During the settlement discussions in the fall of 1992, counsel discussed various alternatives for resolving the case. Tr. 68 (Day 1). According to Plaintiff's counsel, these discussions included a cash buy-out for Plaintiff in exchange for Mr. Bien's resignation; another proposal contemplated Mr. Bien

receiving a Grade 15 position; and a third involved Mr. Bien remaining in his Grade 14 position but receiving a lump sum payment representing back pay. Tr. 69 (Day 1).

4. In recounting Plaintiff's demands for supervisory authority as a component of the settlement negotiations, Ms. Lyons testified that Plaintiff's position changed after an unsuccessful mediation session in October 1992. According to Ms. Lyons, following the mediation and shortly after, the government was not going to offer in settlement the position of Director of OSTA or any other supervisory position. Tr. 80 (Day 3). Plaintiff's demand for supervisory duties changed to proposals which contemplated Mr. Bien obtaining a position which did not involve altering his job duties. Tr. 70 (Day 1), Tr. 80-81 (Day 3).

5. Sometime in February 1993, the parties resumed negotiations looking toward settlement. Ms. Lyons told AUSA Nagle that Mr. Bien was looking for a promotion that would allow him to maximize his retirement benefits by obtaining a Grade 15 position. Tr. 70-71 (Day 1). The subject of supervisory responsibilities being given to Mr. Bien was not discussed during the negotiations.

6. In February 1993, Defendant indicated that it was prepared to give Mr. Bien a Grade 15 position but was not prepared to offer Plaintiff a position which

included his exercising direct supervisory authority "over the work of other indiciduals in the sense of assigning work, overseeing or instructing subordinate employees on the day-to-day performance of their work, or carrying out such tasks as performance evaluations of subordinate employees." Tr. 29 (Day 1). It was understood by Ms. Lyons that the position offered to Plaintiff on February 26, 1993 had a supervisory title but the duties outlined in the position description given to her and thereafter passed on to Plaintiff were essentially identical to the duties he was then performing at the Grade 14 level. Tr. 71-2 (Day 1).

7. The evidence convincingly reflects that the government, in an effort to settle the case, was prepared to promote Plaintiff to a Grade of GM-15, retroactive to 1988, which the government believed was crucial to Mr. Bien's acceptance of the settlement package. Making the promotion retroactive would give Mr. Bien the opportunity to retire in 1995 and receive the maximum retirement benefits as a Grade 15 employee. Tr. 85 (Day 2). It is equally evident from the testimony of all of DOL's management witnesses, AUSA Nagle and Ms. Lyons that DOL was not prepared to offer Plaintiff a position that required him to supervise individual employees within OSHA.

8. To offer Plaintiff a Grade 15 position without any significant modification of his current duties, DOL

was required to create a new position which was designated as, "Supervisory Industrial Hygienist" (Deputy Director, Office of Science and Technology Assessment). The duties for the position were crafted to support a Grade 15 pay scale. Tr. 29 (Day 1).

9. At the request of Plaintiff, the duties were reduced to writing on February 26, 1993, and a facsimile copy was sent to Ms. Lyons (Defendant's Exhibit 7). Plaintiff's attorney understood the copy of the duties she received were the complete position duties of the GM-15 being offered to Plaintiff. Ms. Lyons acknowledged that although the position title contained language such as "Supervisory" and "Deputy Director," Mr. Bien's actual duties in the newly created Grade 15 position would remain essentially the same as his current Grade 14 position and that the promotion would end on July 1, 1995, the first day that Plaintiff would be eligible to retire and obtain retirement benefits with three years at the Grade 15 level. Ms. Lyons also knew that Plaintiff was not being offered a position that required him to undertake different duties from those he was currently performing and that the sole purpose of the promotion was to enhance his retirement benefits retroactive to 1988. Tr. 70-71 (Day 1).

10. Ms. Lyons faxed Mr. Bien a copy of the Grade 15 position duties on the afternoon of February 26, 1993 and discussed them with him. Mr. Bien asked

Ms. Lyons whether he would have an opportunity to serve as a supervisor and or the Acting Director of the division. Ms. Lyons testified that she told Mr. Bien that the position duties did not prohibit him from being given supervisory duties or even being designated as Acting Director. However, she stated that she never indicated to Mr. Bien that supervisory duties were a part of the job description being offered to him. Tr. 86-88 (Day 1).

11. Plaintiff testified that his attorney did not advise him that the position being offered would not involve supervision of other employees. Tr. 102, 105 (Day 2). He further testified that he did not discuss retirement benefits with his attorney. Tr. 105 (Day 2). When asked why the Settlement Agreement included a provision that if he did not retire in 1995, his Grade 15 status would revert back to Grade 14, Mr. Bien stated that he believed that provision constituted age discrimination but he agreed to sign off on that language. He testified that he understood the provision, but did not discuss it with Ms. Lyons. Tr. 108-109 (Day 2). The Court finds that Mr. Bien's testimony that his attorney failed to tell him the offered Grade 15 position did not include supervisory responsibilities is not credible. He subsequently acknowledged that obtaining a Grade 15 promotion was most important to him. Tr. 129 (Day 2). He also conceded that he retired on the first possible date that he could retire in order to obtain the higher retirement benefit. Tr. 131 (Day 2).

12. It was not disputed that as early as 1987, Mr. Bien desired to have a position with supervisory responsibilities. The Court finds as a fact that the supervisory responsibilities Plaintiff sought in his 1991 law suit and by way of settlement were never offered by DOL and were never a subject of or condition precedent to the settlement discussions on February 26, 1993 when the parties were attempting to settle the case before the Monday, March 1, 1993 trial date. Tr. 104 (Day 2).

13. Plaintiff called as witnesses, Ms. Patricia K. Clark, Director of the Directorate of Technical Support for OSHA, who was responsible for the Office of Science and Technology Assessment, and Ms. Patricia Saturen, who was Director of the Office of personnel Programs for OSHA in 1993. Both witnesses testified that DOL for settlement purposes was prepared to offer Mr. Bien a Grade 15 position without supervisory responsibilities.

14. Ms. Saturen, as Director of the Office of Personnel Programs in OSHA in 1993, was responsible for the personnel programs of OSHA, which included recruitment and hiring of individuals, job analysis and classification of positions, employee relations and labor-management relations. Tr. 59 (Day 2).

15. Job analysis and classification of positions involved assigning the title, series and grade to

positions based upon the duties that were assigned. Tr. 59 (Day 2). The titles, series and grades for certain positions are controlled by regulations and guidelines established by the Office of Personnel Management (OPM). Tr. 59 (Day 2).

16. Ms. Saturen was assigned the responsibility to create a position at the Grade 15 level to be offered to Plaintiff. Applying the OPM regulations and guidelines, Ms. Saturen adapted a typical deputy job description to OSHA. The duties crafted to support the Grade 15 position were tailored carefully to meet OPM guidelines without giving Plaintiff hands on supervision of individuals within the agency. The decision not to give Mr. Bien supervisory duties over other employees was a conscious decision not meant to deceive or retaliate against Mr. Bien. Tr. 62-63 (Day 2). He was to be given all the duties he currently performed as the person responsible for respiratory protection within the division of the Office of Science and Technology Assessment with increased management responsibility over programs. Tr. 66 (Day 2).

17. Ms. Saturen testified that to create a Grade 15 position for Mr. Bien, she "stepped out of the box in an effort to attempt to accommodate this settlement and to get what Mr. Bien wanted and what management could live with." Tr. 32, 47 (Day 2). Ms. Saturen graded the position created for Mr. Bien as if the position was for the Office Director because

the deputy position had not previously existed in OSHA. Tr. 33 (Day 2).

18. Ms. Saturen was familiar with the OPM guidelines and the duties of an individual hygienist position. The duties contained in the position created for Mr. Bien on the afternoon of February 26, 1993 expressly excluded supervision or management responsibilities of other individuals in the Office of Science and Technology Assessment. R. 43 (Day 2). The Court finds as a fact that supervisory responsibility was not removed from the Grade 15 position as designated by Ms. Saturen and offered to Plaintiff on February 26, 1993. The Court further finds that giving Mr. Bien a position with supervisory authority was never contemplated by DOL as part of the settlement offer and thus supervisory duties were never included in the job description.

19. Plaintiff argued that OPM's position description for 'Supervisory Industrial Hygienist' includes supervisory responsibilities. (Plaintiff's Exhibit 4). This statement is not disputed by Defendant. Plaintiff further argued that if the OPM position description includes supervisory responsibility, all persons holding such title must be given supervisory duties. Plaintiff presented no testimony to support that assertion. Ms. Saturen, the only personnel specialist to be called as a witness, testified that the OPM regulations governing titles and position duties

are guidelines and if there are no directly applicable standards then the guidelines are applied to arrive at a classification. Tr. 43 (Day 3). The Court finds that the guidelines do not dictate or mandate the duties and responsibilities of the position. Plaintiff's reliance on the OPM position description as mandating that he have supervisory authority over individuals is not supported by the facts.

20. Contrary to Plaintiff's assertions the Court finds that all of the settlement proposals presented to Plaintiff after November 1992, did not contemplate a position with supervisory duties of individuals in the Office of Science and Technology Assessment. Ms. Lyons stated that after the October 1992 mediation she never presented a proposal to AUSA Nagle that included a Grade 15 position with supervisory responsibility. Tr. 79, 86, 104 (Day 1), Tr. 81 (Day 3). "My understanding and I believe Mr. Bien's understanding at the time the faxed position description arrived in my office on February 26, 1993, was that for the government's personnel reasons, those duties that were listed in that document [which did not include supervision responsibility over individuals] had to be described as a supervisory industrial hygienist GM-15 with the designation of deputy" Tr. 81 (Day 3). Ms. Lyons told Mr. Bien that the position was **"essentially the same job that he already held. It...would have an improved title and certainly an improved grade and improved salary, and it would result in**

improved retirement benefits." Tr. 85 (Day 1). Ms. Lyons faxed the job duties to Mr. Bien on February 26, 1993 (Defendant's Exhibit 7). She then discussed the document with Mr. Bien and he did not raise any concerns about the list of duties or indicate that anything was missing from the list. Tr. 85 (Day 1). Plaintiff acknowledged in his testimony that he did not discuss with Ms. Lyons the absence of supervisory duties. Tr. 169-170 (Day 2).

21. Ms. Lyons recalled that she had a conversation with Plaintiff about whether he would have an opportunity to serve as Acting Director in the absence of the Director and she told him that she did not see any reason why that could not happen. Tr. 86 (Day 1). However, Ms. Lyons did not indicate that he would be entitled to serve as Acting Director, because the Director had the discretion to select someone to act as a supervisor and that opportunity may come to Mr. Bien. She did not suggest to Mr. Bien that he would be guaranteed an opportunity to serve as a supervisor. Tr. 87-88 (Day 1). Ms. Lyons stated that there were no discussions or reference to a supervisory role for Mr. Bien in the negotiations leading up to the settlement agreement. Tr. 88 (Day 1), Tr. 83-84 (Day 3).

22. A Stipulation of Settlement and Dismissal was executed by the parties on March 18, 1993 and approved by the trial court. The document did not have as an attachment the job position duties

prepared and given to Plaintiff on February 26, 1993. Ms. Lyons testified that she fully communicated to Mr. Bien the terms of the proposal and fully communicated with Mr. Bien throughout the settlement process. Tr. 75-76 (Day 1). Ms. Lyons knew that the GM-15 position would end on the earliest date of Plaintiff's retirement eligibility in July, 1995, and it was his intention to retire at that time. The government was told of Mr. Bien's retirement plans. Plaintiff was not committing to retirement on any specific date, but under the provisions of the settlement agreement, if he elected not to retire in July 1995, his position grade of GM-15 would at that time revert back to a GS 14. Ms. Lyons testified that the purpose of the limited time in a GM-15 "was to give him whatever that amount of time in the 15 would be, so that his retirement benefits would be paid to that grade level and not to his preexisting grade level." Tr. 89-90 (Day 1).

23. The terms of the Settlement and Stipulation provided: (1) Plaintiff would be given a promotion to a Grade GM-15 position retroactive to January 31, 1988; (2) Plaintiff would receive the lumpsum of $30,000 in full satisfaction of all claims for back pay, bonuses, costs and attorney's fees and the expenses that could have been awarded at trial if Plaintiff was successful; (3) the position Plaintiff accepted would expire on July 1, 1995, the date Plaintiff became eligible for retirement; (4) if Plaintiff declined to retire on that date, he would immediately be returned

to the GS-14 Industrial Hygienist position he held prior to his promotion pursuant to the settlement position and would be paid at the rate of a GS-14, step 10 effective July 2, 1995 and ; (5) Defendant would change previous performance appraisals to either "outstanding" or "highly effective" depending on the year. Joint Exhibit 1.

24. On April 12, 1993, Ms. Saturen, the personnel officer for OSHA, signed off on an official position description for the GM-15 position given to Plaintiff as a result of the Settlement Agreement. The position description provided that the position was limited to the incumbent Mr. Bien and would be abolished when vacated by Mr. Bien or on July 1, 1995, whichever occurred first. Joint Exhibit 2

25. Mr. Bien testified that he first became aware that the GM-15 position he accepted did not provide for supervisory duties when he received a copy of the official job description on April 12, 1993. Tr. 61 (Day 2). He acknowledged, however, that the five paragraph description of job duties he received in the copy of the fax transmission from Mr. Nagle to Ms. Lyons on February 26, 1993 were the same five duties and responsibilities identified in the formal position description he received on April 12, 1993, after the settlement. Tr. 103 (Day 2)

26. Ms. Lyons stated that she communicated to Mr. Bien the substance of what the government was

offering by way of settlement. She did not believe that Mr. Bien could have been misled and if, in fact, he thought he had been misled by what the government was offering, Mr. Bien did not so inform her after he received the official position description on April 12, 1992. Tr. 95 (Day 1).

27. The Court finds as a fact that the Plaintiff was fully advised and testified that he knew the GM-15 position of Supervisory Industrial Hygienist (Deputy Director, Office of Science and Technology Assessment) offered to him on February 26, 1993 and thereafter incorporated in the Settlement Agreement and Dismissal executed on March 18, 1993 did not provide for him to exercise any supervisory authority over individuals in the Office of Science and Technology Assessment.

28. Following receipt of the official job description, Mr. Bien wrote memoranda to Ms. Clark and Ms. Saturen requesting changes in his position responsibilities. The memorandum to Ms. Clark dated April 30, 1995, noted that "[s]ince I am the most senior officer in OS&T by grade, experience, and seniority, I request that I be assigned the responsibility to manage the Office of Science and Technology Assessment until a Director is appointed." Joint Exhibit 8. On May 6, 1995, Plaintiff wrote to Ms. Saturen advising her that his position description dd not indicate whether the Deputy served as the Acting Office Director during

the absence of the Director for the OSTA and requested a revision in his position description to reflect the inclusion of that responsibility. Joint Exhibit 3.

29. The Court finds as a fact that the official job description language was the same as the position duties faxed to Mr. Bien's counsel on February 26, 1993, and agreed to by him with the exception of the first and last paragraphs. The first paragraph labeled 'Introduction' and the last paragraph do not add or detract from the descriptive language contained in the body of the one page document faxed to Plaintiff's counsel on February 26, 1993.

30. The parties stipulated that other employees in the Office of Scient and Technology Assessment, specifically Ira Wainless, Debbie Gabry and Long Loo, who were all at least two grades below a Grade 15, served as Acting Director for periods of time while Mr. Bien was serving in a position described as Deputy Director. Tr. 96 (Day 3).

31. Plaintiff called as a witness Mr. Steven J. Mallinger, the Deputy Director of the Directorate of Technical Support in OSHA from 1981 until 1996, who testified that he was a Grade GM-15 Supervisory Industrial Hygienist and had not supervised any individuals for the past 18-19 months. He testified that during the period of the negotiations leading up to the Settlement Agreement

between Mr. Bien and DOL, there were three conditions to the settlement proposed. "[T]he three things were that he [Mr. Bien] would get a certain amount of money,... that he would be given a [Grade] 15 position for three years, and that it would revert back to the [Grade] 14 level after the three years; and number three, that he would not supervise employees." Tr. 132 (Day 3). Mr. Mallinger learned of these conditions at a meeting with Mr. Willie Alexander, the attorney in the Solicitor's Office and AUSA Nagle.

32. It was the understanding of Mr. Mallinger that the reason Mr. Bien was not selected to serve as Acting Director was because while his technical skills were very strong, and he had an in depth knowledge of the respiratory protection field, "his supervisory skills were not as strong" and the agency had reached the conclusion that Mr. Bien would be better utilized if he remained the agency's technical expert in the respiratory program. Tr. 144 (Day 3).

33. On July 1, 1995, Plaintiff retired. He alleges in his complaint that he was forced to retire because of stress occasioned by Defendant's failure to allow him to exercise supervisory authority over other persons within his division. Without specifically so stating, Plaintiff is alleging constructive discharge. Plaintiff offered no evidence to support his allegation of constructive discharge.

III. Conclusions of Law

1. The Court's jurisdiction is found in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-5 and 2000e-6.

2. Plaintiff alleges that Department of Labor engaged in impermissible retaliatory action in violation of Title VII because of his opposition to employment discrimination in the numerous EEO complaints he had filed. Complaint, 9.

3. The specific acts of retaliation alleged by Plaintiff are: (1) removal of supervisory responsibility from the GM-15 position Plaintiff received pursuant to the Settlement Agreement; (2) Plaintiff was required to report to subordinate supervisors as low as two grade levels below his grade; (3) Plaintiff was excluded from all managerial decision making; (4) Defendant's treatment of Plaintiff caused him to retire early; and (5) Plaintiff was totally ignored when he reported that the treatment he was receiving was inconsistent with the Settlement Agreement. Complaint, 11-15; Tr. 11-13 (Day 2).

4. Retaliation against an employee by an employer for engaging in lawful conduct or opposing unlawful conduct is a violation of 42 U.S.C. 2000e(3)(a).

5. It is well settled that an employee alleging Title VII retaliation must, under the general framework of

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), establish a *prima facie* case of retaliation by showing (1) that he was engaged in protected activity, (2) that he was subject to adverse action by the employee and (3) that there was a causal connection between the adverse action and the protected activity. Brown v. Brody, 199 F.3d 446, 455 (D.C. Cir. 1999); Thomas v. Nat'l Football League Players Ass'n, 131 F.3d 198, 202 (D.C. Cir. 1997). If a plaintiff meets his burden of making a *prima facie* case, a rebuttable presumption arises of impermissible retaliation. Id. (Citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254 (1981)). The employer may rebut the presumption with evidence of a legitimate non-discriminatory reason for his actions. If the employer asserts a non-discriminatory explanation, the presumption of unlawful retaliation is rebutted and the employee must then demonstrate that the proffered explanation by the employer was pretextual or not the real reason for the employer's conduct. These thrusts and parries have been characterized as the shifting burdens of production. The ultimate burden of proof, however, remains with the plaintiff. Cones v. Shalala, 199 F.3d 512, 519 (D.C. Cir. 2000).

6. Plaintiff must also prove that adverse consequences resulted form the alleged retaliatory action by the employer. Rowland v. Riley, 5 F.Supp.2d 1, 3 (D.D.C. 1998). Of the panoply of retaliatory acts alleged by Plaintiff, only the failure of

give him supervisory responsibility would constitute adverse action sufficient to support a claim of unlawful retaliation. Doe v. DeKalb County School District, 145 F.3d 1441, 1449-50 (11th Cir. 1998). The impact of the adverse action on the employee must be substantial and not merely trivial. Simms v. U.S. Government Printing Office, 87 F.Supp. 2d 7 (D.D.C. 2000).

The Court concludes that Plaintiff has not proven unlawful retaliation by a preponderance of the evidence. The Court will analyze each of Plaintiff's alleged acts of retaliation. The Court finds that allegations that Ms. Clark and Ms. Saturen ignored Mr. Bien because they did not respond or were slow in responding to some of his complaints to be frivolous and do not rise tot he level of adverse action sufficient to support a claim of retaliation.

Failure to give Plaintiff Supervisory Responsibility

7. Central to Plaintiff's retaliation complaint is the allegation that Defendant wrongfully removed supervisory duties from the GM-15 Supervisory Industrial Hygienist position to which he was appointed as part of the settlement.

8. The Court has found as a fact that Plaintiff was not misled with respect to the precise duties he was to perform in his GM-15 position. Ms. Lyons

testified that when Plaintiff first sought her legal services he wanted the position of Director of OSTA, and the government's position throughout the settlement negotiations was both unequivocal and non-flexible in its unwillingness to give Mr. Bien a position with supervisory or management responsibilities. Tr. 69 (Day 1).

9. Throughout the trial, Plaintiff argued that he was misled by Defendant because the position to which he was promoted as part of the Settlement Agreement was given the title of Supervisory Industrial Hygienist (Deputy Director Office of Science & Technology Assessment). It is Plaintiff's contention that the agency's decision to promote him to a position containing the word "Supervisory" in its title compelled the agency to give him supervisory duties over individuals in his division. Plaintiff's argument relies exclusively on the OPM guideline definition of Industrial Hygienist GS-Series 690 which defines "Supervisory Industrial Hygienist" as "the [title] authorized for positions which involve supervisory duties and responsibilities as defined in the Supervisory Grade-Evaluation Guide." Plaintiff's Exh. 8. Plaintiff contends that because the OPM definition embodies the language supervisory duties and responsibilities, the job description for that position must contain duties that clothe him with supervisory duties over individuals. He concedes, however, that a person holding that position would not have "to supervise all the time." Tr. 47 (Day 4).

Plaintiff's counsel in his closing argument agreed that the crux of Plaintiff's retaliation allegation with respect to removal of supervisory responsibility was that DOL "did not have the right or authority,...to restrict or in any way limit the duties and responsibilities of [the] GM-15 position or modify the OPM guidelines to restrict supervising individuals." Tr. 49 (Day 4). The Court finds Plaintiff has not presented any facts to support his interpretation of the OPM guidelines. Ms. Saturen, the DOL personnel specialist, testified that the OPM guidelines were, as their name implies, guidelines subject to modification by the agency. The Court concludes that to suggest otherwise, absent testimony to the contrary, would place form over substance. Job titles, in contrast to job descriptions, do not always reflect the nature and responsibilities of the person filling the position. Some companies have numerous vice presidents and assistant managers who do not automatically replace the president or manager when the president or manager is otherwise engaged. In the context of Title VII respondeat superior responsibility, courts have "distinguished employees who are supervisors merely as a function of nomenclature from those who are entrusted with actual supervisory power." See. Parkings v. Civil Constructors of Ill., Inc., 163 F.3d 1027, 1033 (7th Cir. 1998).

10. Even if DOL had misapplied the OPM guidelines in drafting Plaintiff's position duties, that

circumstance would not *per se* have established impermissible adverse action. An employer's failure to "follow its own regulations and procedures, alone, may not be sufficient to support" a conclusion that the explanation of the questioned action of the employer was pretextual. Fischbach v. D.C. Dept. of Corrections, 86 F.3d 1180, 1183, (D.C. Cir. 1996).

11. As noted above, in order to effect the promotion within the framework of the OPM regulations and guidelines and only minimally change Mr. Bien's existing Grade 14 duties, a new position was created that reflected the grade and duties the agency was willing to offer Mr. Bien by way of settlement and those duties expressly did not include supervising individuals because supervision was not one of Plaintiff's strengths. His expertise in the field of respiratory protection was not questioned and the agency believed his talents were better utilized in that area. This reason was confirmed by OSHA hiring Plaintiff as a consultant following his retirement in 1995. Tr. 140 (Day 2). Plaintiff did not present any facts that purported to refute the reason stated by Mr. Mallinger or show that the reason given was pretextural.

12. The decision not to offer Mr. Bien a GM-15 position that included duties requiring the supervision of individual employees within his division cannot be challenged as a violation of Title VII if it was based on lawful criteria and made

without discriminatory animus or otherwise based on Mr. Bien's race, national origin, gender or religion. See. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 259 (1980); Simmons v. Billington, 1989 WL 222729, 53 Empl.Prac.Dec. 539,994 (D.D.C. Nov. 9, 1989), *aff'd per curiam* (D.C.Cir. 1990). Absent an unlawful discriminatory basis for personnel action, courts should not micro-manage or second guess an employer's personnel decisions. Milton v. Weinberger, 696 F.2d 94, 100 (D.C. Cir. 1982). Plaintiff can point to no testimony including his own, that establishes by a preponderance of the evidence that the Defendant, as part of the settlement package, led him to believe that the GM-15 position "Supervisory Industrial Hygienist" (Deputy Director, Office of Science and Technology Assessment) encompassed supervisory responsibilities over individuals and thereafter removed such duties. While credible evidence supporting that proposition could establish a *prima facie* case of unlawful retaliation, the record is devoid of such proof. The testimony of Ms. Lyons, Plaintiff's attorney and Plaintiff himself convincingly establish that Mr. Bien knew at the time he signed the Settlement Agreement on March 18, 1993 that the GM-15 position he accepted as consideration for his dismissal of the lawsuit did not include supervisory responsibilities over persons. Thus the Court concludes that the decision not to entrust Mr. Bien with supervising authority while he held the position of Supervisory Industrial Hygienist does not

constitute unlawful retaliatory discrimination.

Requiring plaintiff to report to persons with less experience and of lower grade

13. Plaintiff presented no evidence or case authority to support his claim that a person of lower grade temporarily serving in an acting director capacity and thus having supervisory authority over the Plaintiff for certain aspects of his employment was *per se* an adverse consequence. Smart v. Ball State University, 89 F.3d 437, 441 (7th Cir. 1996). Plaintiff did not present any evidence that he was the only employee in his Directorate who was supervised by a designated Acting Director of lower grade or experience. Accordingly the Court concludes that requiring Plaintiff to report to a temporary Acting Director whose grade was lower than his was not impermissible retaliation.

Exclusion from managed decision making

14. Plaintiff presented no evidence in support of his allegation that he was excluded from managerial decision making in areas within the scope of his responsibilities.

Defendant's action caused Plaintiff to retire early

15. Plaintiff testified that he retired on July 1, 1995 because the retaliatory acts of Defendant caused him

to sustain mental stress. An employer's conduct or a hostile work environment that adversely affects the employee's ability to work causing the employee to resign may result in a constructive discharge. To state a claim for constructive discharge, a plaintiff must allege that the employer intentionally caused or allowed the employee's working conditions to become so intolerable that the employee was compelled to leave involuntarily. Mungin v. Katten Muchin & Zavis, 116 F.3d 1549, 1558 (D.C. Cir. 1997)(citing Clark v. Marsh, 665 F.2d 1168, 1173 (D.C. Cir. 1981)). Ms. Lyons testified that the government was promoting Plaintiff to the GM-15 position until his earliest date for retirement eligibility, July 1, 1995, and it washis intention to retire at that time. Tr. 89 (Day 1). The fact that Plaintiff continued to work until the date he was eligible to retire and receive maximum benefits belies his argument that his working conditions had become so intolerable he was compelled to leave involuntarily. The Court finds that the evidence does not support a conclusion that Mr. Bien was constructively discharged.

16. After carefully reviewing the three days of testimony, the Court finds the record is devoid of any evidence that supports Plaintiff's claim of unlawful retaliation. Under the rubric of a complaint of Title VII discrimination, it appears that Plaintiff is seeking relief for what was essentially post-settlement remorse and hurt pride. On February 26, 1993,

Plaintiff and Defendant reached a meeting of the minds and Plaintiff voluntarily agreed to dismiss his pending lawsuit if Defendant would promote him to a GM-15 Series 690, give him a lump sum payment of $30,000, and change some of his annual performance ratings. The Settlement Agreement was achieved following several 'arms length' negotiations between counsel for the respective parties. Neither Plaintiff nor Defendant were obliged to settle the case which was set for trial the following court day. The Court having found no misrepresentation on the part of the government, Plaintiff is bound by his voluntary acceptance of the settlement offer. He could have elected to go to trial and prevailed on his discrimination claim or assumed the risk of having a judgment rendered against him. Plaintiff chose to voluntarily accept the government's offer and avoid the risk of not prevailing. Plaintiff is well educated and sophisticated chemical engineer who throughout the negotiations leading up to the settlement was represented by able counsel. He has not alleged that he did not have a full opportunity to read and review the Settlement Agreement with his counsel, noe does he allege that th did not understand its provisions. Moreover, he cannot allege that he was pressured into signing the agreement in the face of his unequivocal statement that he was the sole decision maker in accepting the settlement proposal and not his counsel. Tr. 138 (Day 2). Black letter contract law teaches that "a person who signs a contract after

having had an opportunity to read and understand it is bound by its provisions." Goldman v. Dequai, 19 F.3d 666, 672 (D.C. Cir. 1994).

17. Accordingly, the Court finds that Plaintiff, under the terms and provisions of the Settlement Agreement he executed on March 18, 1993, received what he bargained for. The Court further finds that Defendant's decision not to offer him a position that included supervisory responsibility was not a violation of the OPM guidelines and was not retaliation within the intendment of Title VII. The Court further concludes that following the settlement of Ching-Tsen Bien v. Lynn Martin, CA 91-2597, Defendant did not take any adverse action against the Plaintiff that would support a claim of unlawful retaliation.

Date: July 20, 2000

Signature on Original
ALAN KAY
UNITED STATED
MAGISTRATE JUDGE

(Footnotes Are Omitted)

*****APPENDIX D*****

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CHING-TSEN BIEN	*	
	*	
Plaintiff,	*	
	*	
v.	*	**Civil Action No.:**
	*	**97- 0572 (AK)**
	*	
CYNTHIA A. METZLER/ HERMAN	*	
	*	
	*	
	*	
Defendant.	*	

* *

PLAINTIFF'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

1. Plaintiff (hereinafter "Mr. Bien") began working for the Department of Labor in 1972.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

2. The Office of Science & Technology Assessment (hereinafter "OSTA") came into existence in 1977, and Mr. Bien worked there

from its inception.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

3. Mr. Bien was the consummate professional whose superb knowledge of Industrial Hygiene was recognized, in writing, on more than one occasion.

**Mr. Bien testified about his education, experience, and professional recognition, and it was uncontradicted by Defendant.*

**Mr. Hank Woodcock testified that Mr. Bien was the "guru" of Industrial Hygiene in this country.*

**Plaintiff's Exhibits 1, 2, & 3 are letters recognizing Mr. Bien's expertise and help in the industrial hygiene field. Exhibits 1, 2, & 3 were placed in evidence.*

4. Mr. Bien was the Industrial Hygiene Expert for the OSTA.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

5. In 1981, Mr. Bien was promoted to supervisor in the OSTA.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

IN SPITE OF MR. BIEN'S DEMONSTRATED EXPERTISE IN

INDUSTRIAL HYGIENE, HE WAS DISCRIMINATED AGAINST AS FOLLOWS:

6. In 1987, he received an "Outstanding" performance rating from the Director which was subsequently lowered later by the Director's supervisor, with no rational explanation.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

7. In 1987, Mr. Bien applied for the position of Director of OSTA, and someone outside of OSTA was selected for the position even though Mr. Bien had more experience, education, seniority, and knowledge of OSTA's operations than the selectee. Mr. Bien knew this to be so because he reviewed the selectee's 171 (i.e., job application).

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

8. Mr. Bien filed an Equal Employment Opportunity ("EEO") Complaint because of his non-selection.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

9. In 1988, Mr. Bien was denied a

supervisor's bonus, something which had never occurred prior to his EEO Complaint. He was also given a low performance rating with no rational explanation.

**Mr. Bien testified to this fact, and it was uncontradicted by the Defendant.*

10. Mr. Bien filed another EEO Complaint.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

11. In 1989, Mr. Bien was removed from his supervisory position and placed in a non-supervisory position, with the explanation that he could not serve as both the agency's expert and a supervisor even though other agency experts did precisely that.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

12. Mr. Bien filed a third EEO Complaint.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

13. In 1990 and 1991, Mr. Bien continued receiving poor performance ratings without any rational explanation.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

**The Equal Employment Opportunity*

Commission's decision, rendered June 4, 1999 (finalizing its earlier decision, finding discrimination, of 7/27/98), found the Defendant to have discriminated against the Plaintiff in rating his performance. Both Decisions Were Received Into Evidence At Plaintiff's Request.

14. In October 1991, Mr. Bien filed a lawsuit in the U.S. District Court against the Defendant because of its discrimination against him.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

THE ABOVE DISCRIMINATION AGAINST PLAINTIFF LED TO MR. BIEN'S ABOVE MENTIONED PROTECTED ACTIVITY (i.e., EEO COMPLAINTS AND LAWSUIT), WHICH IN TURN LED TO DEFENDANT'S FOLLOWING DISCRIMINATORY RETALIATION.

15. In 1993, the Defendant offered to settle Mr. Bien's Lawsuit, and the parties reached a mutual agreement.

**Plaintiff's Exhibit 4 proves this fact. It was received into evidence.*

16. One of the terms of the settlement was that Mr. Bien was to return to work to assume a supervisory position, namely, GM-15 Supervisory Industrial Hygienist.

**Plaintiff's Exhibit 4 proves this fact. It was received into evidence.*

17. Being a former supervisor who relied on the Office of Personnel Management (hereinafter "O.P.M.") regulations to draft job descriptions, Mr. Bien knew a GM-15 Supervisory Industrial Hygienist position involved supervisory duties and responsibilities according to O.P.M. guidelines, and hence, he agreed to accept that position as part of the settlement.

**Mr. Bien testified that he knew of O.P.M.'s definition of a Supervisory Industrial Hygienist prior to settling his case. This testimony was uncontradicted by Defendant.*

**Mr. Bien testified that he knew a GM-15 Supervisory Industrial Hygienist involved supervisory duties and responsibilities. This testimony was uncontradicted by Defendant.*

**Mr. Bien testified that he did not tell his attorney to assure that his GM-15 Supervisory Industrial Hygienist position would involve supervisory duties because the position title indicates that. This testimony*

was uncontradicted by Defendant.

**Plaintiff's Exhibit 8 (O.P.M.'s regulation and definition of a Supervisory Industrial Hygienist) also proves this fact. It was received into evidence.*

18. After settlement, Mr. Bien went to the office to assume his GM-15 Supervisory Industrial Hygienist position, and his promotion was never announced to the staff, even though announcing promotions was standard practice.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

**Patricia Clark also testified that Mr. Bien's promotion was not announced to the staff.*

19. Mr. Bien was also given a job description which removed all supervisory duties and responsibilities, inconsistent with O.P.M. regulations (the Defendant provided the applicable O.P.M. regulation to Plaintiff during discovery).

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

**Plaintiff's Exhibit 5 is the position description which removed all supervisory duties and responsibilities. It was received into evidence.*

**Plaintiff's Exhibit 8 is the O.P.M. regulation that was violated. It was received into evidence.*

20. Mr. Bien was never allowed to supervise anyone.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

**Patricia Clark testified that Mr. Bien was not allowed to supervise anyone.*

**Stephen Mallinger testified that Mr. Bien was not allowed to supervise anyone.*

**Patricia Saturen testified that Mr. Bien was not allowed to supervise anyone because he agreed to that. However, she could not support that statement by reference to the parties' settlement agreement, other written document, or even a verbal statement from Mr. Bien or his attorney that he agreed to accept a supervisory position without supervisory duties and responsibilities.*

21. Mr. Bien was never allowed to attend OSTA supervisor management meetings.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

22. When Mr. Bien brought the omission of supervisory duties from his supervisory job to the attention of Patricia Clark (Director) and

Patricia Saturen (O.P.M.), they flatly refused to add supervisory duties to the GM-15 Supervisory Industrial Hygienist position, claiming Mr. Bien agreed to accept a supervisory position without supervisory duties. This claim was made even though Ms. Clark and Ms. Saturen had no first hand knowledge of what Mr. Bien agreed to and did not have any written or verbal statement from Mr. Bien or his attorney that he was accepting a GM-15 Supervisory Industrial Hygienist position without supervisory duties.

**Mr. Bien testified to this fact.*

**Plaintiff's Exhibit 6 is Mr. Bien's memorandum to Ms. Clark about the omission of supervisory duties from his supervisory position. It was received into evidence.*

**Ms. Clark testified that Mr. Bien agreed to his supervisory position without supervisory duties and responsibilities even though she testified that she had no first hand knowledge of what Mr. Bien agreed to. She also acknowledged in her testimony that she had no written or verbal statement from Mr. Bien or his attorney that he agreed to a GM-15 Supervisory Industrial Hygienist position with no supervisory duties and responsibilities.*

**Ms. Saturen testified that Mr. Bien agreed to his supervisory position without*

supervisory duties and responsibilities even though she testified that she had no first hand knowledge of what Mr. Bien agreed to. She also acknowledged in her testimony that she had no written or verbal statement from Mr. Bien or his attorney that he agreed to a GM-15 Supervisory
Industrial Hygienist position with no supervisory duties and responsibilities.

**Defendant's Joint Exhibits 4 & 5 are the memorandums Ms. Clark and Ms. Saturen wrote to Mr. Bien maintaining their positions. They were received into evidence.*

** Joint Exhibits 4, 5, & 7 (from Ms. Clark and Ms. Saturen) do not mention anything about maximizing Mr. Bien's retirement benefits as the reason for his supervisory position without supervisory duties and responsibilities, even though they testified that such was the case. These exhibits were received into evidence.*

23. Mr. Bien was forced to report to individuals with lower grades than him, less experience than him, less education than him, and less seniority than him.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

**Defendant stipulated to this fact with respect to Mr. Wainless, Ms. Gabry, and Mr.*

Loo.

**Plaintiff's Exhibits 9, 10, 11 & 12 prove this fact also. They were received into evidence.*

24. Mr. Bien was prevented from rotating into the Acting Director's position even though individuals with far less experience, education, and seniority were made Acting Director.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

**Mr. Bien's co-workers, Mr. Cheeks and Ms. Jones, testified to this fact, and it as uncontradicted by Defendant.*

**Defendant stipulated to this fact with respect to Mr. Wainless, Ms. Gabry, and Mr. Loo. These individuals supervised Mr. Bien (a person) while the Plaintiff, as Deputy Director, was prevented from similar supervision.*

**Plaintiff's Exhibits 9, 10, 11 & 12 prove this fact also. They were received into evidence.*

25. Forcing Mr. Bien, as a GM-15 Supervisory Industrial Hygienist, to report to individuals two grade levels below him (i.e., GS-13) was negative disparate treatment of him (discriminatory).

**Mr. Mallinger testified that, as a GM-*

15 Supervisory Industrial Hygienist, he had never reported to GS-13s in over twenty years of working for the government.

26. Other GM-15 Supervisory Industrial Hygienist positions involved supervising people and the removal of such from Mr. Bien show a difference in treatment of Mr. Bien that is negative and discriminatory.

Mr. Mallinger testified that he evaluated Mr. Bien (i.e., supervised a person) and that he was a GM-15 Supervisory Industrial Hygienist at that time.

27. Mr. Bien and his attorney were deliberately misled by Defendant's deceit (in the sense of practitioners of discrimination trying to conceal their retaliation) in the form of total silence on removing supervisory duties from Mr. Bien's GM-15 Supervisory Industrial Hygienist position, inconsistent with O.P.M. regulations and the very lawsuit underlying the settlement.

**Mr. Bien testified that he was never told by anyone that his GM-15 Supervisory Industrial Hygienist position would not contain supervisory duties and responsibilities.*

**Mr. Bien's attorney testified that removing supervisory duties from Mr. Bien's*

GM-15 Supervisory Industrial Hygienist position was never discussed by the Defendant.

**Mr. Bien's attorney testified that she thought Mr. Bien could function as a supervisor during a vacancy, and she shared that belief with Mr. Bien.*
Also, the Defendant did not say anything to her during the negotiations to disengage such ideas.

**Mr. Bien's attorney testified that the Defendant never stated that Mr. Bien would be receiving a GM-15 Supervisory Industrial Hygienist position without supervisory duties.*

**Mr. Bien's attorney testified that she thought Mr. Bien understood that his GM-15 Supervisory Industrial Hygienist position would not entail movement in his duties even though [a] Mr.Bien did not tell her he agreed to a supervisory position without supervisory duties, [b] Defendant did not say the supervisory position would not have supervisory duties, and [c] the fax sent to her did not state those were <u>all</u> the duties of the GM-15 Supervisory Industrial Hygienist position.*

**Mr. Nagle testified that it was understood by the parties that the GM-15 Supervisory Industrial Hygienist position would not be a supervising position even*

though [a] he had nothing in writing stating such, [b] he had no verbal statement from Mr. Bien or his attorney that Plaintiff agreed to a supervisory position without supervisory duties, [c] he claimed to rely on notes which he did not produce nor did Defendant put anything in evidence purporting to be such, [d] he could not remember what he had for breakfast, lunch, or dinner around this same time (i.e., over six years earlier) nor could he remember who he spoke to during the day around this same time, and [e] he represents the definition of bias since he was the attorney for the Defendant.

**Defendant's Exhibit 1 show a faxed narrative of some duties without any indication that they are all the duties of Mr. Bien's supervisory position.*

**Plaintiff's Exhibit 8 show O.P.M's. regulation requiring supervisory duties and responsibilities for a GM-15 Supervisory Industrial Hygienist position.*

28. As a result of Defendant's disparate treatment of Mr. Bien, he was forced to retire before he wanted to. His retirement was not to maximize his pension since at retirement, he could collect only 37% of his salary, and such a low collection percentage in retirement did not make sense to the Plaintiff. Hence, he

only retired because of the discrimination.

**Mr. Bien testified to this fact both during direct and cross examination.*

29. Mr. Bien suffered financial losses of over $250,000.00 based on the Court requested recalculation of Plaintiff's losses at the GS-14 level.

**See. Attached Exhibit "A"*

THE DISCRIMINATORY RETALIATION IS HIGHLIGHTED BY THE FACT THAT MR. BIEN'S EXPERTISE CONTINUES TO BE RELIED ON BY DEFENDANT.

30. As an Independent Industrial Hygiene Consultant, Mr. Bien's principal client is the Defendant.

**Mr. Bien testified to this fact, and it was uncontradicted by Defendant.*

Conclusions of Law

It is unlawful for an employer to retaliate against an employee who engages in protected activity. 42 U.S.C. Sec. 2000e-3(a). Retaliation is prohibited by Title VII of the Civil Rights Act of 1964, as amended, for the purpose of preventing employers from intimidating employees and "chilling" the

exercise of their right to oppose unlawful conduct. In establishing "Retaliation," the Plaintiff must show (1) the employee engaged in protected activity; (2) the employer took adverse employment action against the employee, and (3) a causal connection existed between the protected activity and the adverse action. Parrott v. Cheney, 748 F. Supp. 312 (D. Md. 1989), aff'd, 914 F.2d 248 (4th Cir. 1990).

Once the prima facie case is made out, an employer must produce a legitimate nondiscriminatory reason for the adverse action to rebut the presumption of retaliation. Id. (748 F. Supp. at 318). If the employer does produce a legitimate nondiscriminatory reason for the adverse action, the employee bears the ultimate burden of proving retaliation by demonstrating that the employer's proffered reason is pretextual (pretext proof is showing that the adverse action would not have occurred "but for" the protected conduct). Id. (748 F. Supp. at 318).

Employee Engages In Protected Activity

The lawsuit underlying the settlement agreement (Plaintiff's Exhibit 4) constitutes

classic protected activity. Also, Mr. Bien's uncontradicted testimony proves that he filed EEO Complaints in 1987 (non-selection for the Director of OSTA), 1988 (denial of his supervisor's bonus), and 1989 (reassignment from his supervisory position to a non-supervisory position).

Employer's Adverse Employment Action

After filing his 1987 EEO Complaint for non-selection, Mr. Bien's uncontradicted testimony proves he was [a] denied a supervisor's bonus, something that never occurred prior to his EEO filing, [b] removed from his supervisory position and reassigned to a non-supervisory position, [c] given poor performance ratings without any rational explanation (which EEOC eventually found discriminatory [decision is in evidence]), and [d] had supervisory duties removed from a GM-15 Supervisory Industrial Hygienist position, which by definition in O.P.M.'s regulations involves supervisory duties and responsibilities. Plaintiff's Exhibit 8 shows the applicable regulation and the indisputable language stating---"Supervisory Industrial Hygienist" is the title authorized for positions which involve supervisory duties and

responsibilities . . . ." Furthermore, this O.P.M. regulation does not mention "management"; it uses "supervisory," and hence, attempts by the Defendant to camouflage its discrimination by interchanging the two words "flies in the face" of the clear language of the regulation. None of the above mentioned disparate treatment of the Plaintiff ever occurred prior to his filing of EEO Complaints.

The Defendant's attempts at providing a non-discriminatory reason for its treatment of Plaintiff defies logic. First, its claim that Plaintiff agreed to a GM-15 Supervisory Industrial Hygienist position without supervisory duties has only bias or convoluted support. Mr. Nagle's selective memory and representation of the Defendant, Ms. Clark's imposition or authorization of all the disparate treatment of Mr. Bien without any written departmental support for her actions, Mr. Mallinger and Ms. Saturen's decisions to "do what they were told" regardless of whether it was discriminatory or in violation of O.P.M. regulations, and Ms. Lyons' confusion about what duties Mr. Bien would perform thanks to the Defendant's "deceptive silence" during the negotiations, all represent bias or confusion.

The reason for such is simple---Defendant never sought to end its discrimination against Mr. Bien, and such continued even in negotiations. This conclusion is supported by the fact that a simple statement indicating that the Plaintiff would not supervise would have ended all uncertainty.

The discrimination of the Defendant in the form of retaliation against Mr. Bien cannot be overlooked when the countless occurrences contradicting the Defendant's "nondiscriminatory explanation" are reviewed. They are [a] no where is it written that Mr. Bien agrees to a GM-15 Supervisory Industrial Hygienist position without supervisory duties; [b] no where has anyone testified that Mr. Bien or his attorney stated that Mr. Bien agrees to a GM-15 Supervisory Industrial Hygienist position without supervisory duties; [c] no where in the "fax" (Defendant's Exhibit 1) is it stated that these are all the duties of Mr. Bien GM-15 Supervisory Industrial Hygienist position; [d] no where has the Defendant provided written federal authorization to create a GM-15 position description inconsistent with O.P.M regulations; [e] no where has testimony been provided that indicates the specific federal

authority to create a GM-15 position description inconsistent with O.P.M. regulations; [f] no where has even the Defendant testified that Mr. Bien or his attorney stated that the Plaintiff agreed to accept a GM-15 Supervisory Industrial Hygienist position without supervisory duties; [g] no where has anyone testified that Defendant stated flatly to Mr. Bien or his attorney that the Plaintiff's GM-15 Supervisory Industrial Hygienist position is a position without any supervisory duties for the duration of the position; [h] no where is there written support for Defendant's claim that Plaintiff was interested in maximizing his retirement and that is why he agreed to a GM-15 supervisory position without supervisory duties; [i] no where is there written or verbal evidence that the 37% of salary Mr. Bien is now receiving in retirement was a maximization of his retirement benefits; [j] no where is there anything in writing to support the Defendant's claims that everyone knew there would be no supervising in Plaintiff's GM-15 Supervisory Industrial Hygienist position (in fact, Plaintiff's testimony and Exhibit 6 indicate he immediately brought the removal of supervisory duties from his GM-15 supervisory position to the attention of Ms.

Clark after receiving his final position description), [k] no where has anyone provided written federal guidelines or regulations establishing that "manage" and "supervise" are interchangeable functions and the use of one denotes the other, and [l] everywhere in the case it is clear that Defendant had an obligation to state crystal clearly in writing (or even verbally) that Mr. Bien's GM-15 Supervisory Industrial Hygienist position would NOT contain any supervisory duties and responsibilities, and the Defendant's silence on such a crucial, O.P.M. violating, term denotes deliberate misleading in order to retaliate against the Plaintiff for filing EEO Complaints and a discrimination lawsuit; this fact is emphasized by the past-discrimination against Mr. Bien that even EEOC found to be so.

Causal Connection Between Protected Activity And Adverse Action

The evidence unquestionably shows that prior to Mr. Bien's 1987 EEO Complaint, [i] he had never been denied a supervisor's bonus (Plaintiff's uncontradicted testimony); [ii] he had never been removed from his supervisory position (i.e.,

reassigned)(Plaintiff's uncontradicted testimony regarding his EEO Complaint because of such); [iii] he had never received poor performance ratings without rational explanations (Plaintiff's uncontradicted testimony and the EEOC Decision Received Into Evidence), and [iv] he had not been in a supervisory position without supervisory duties and responsibilities (Plaintiff's Present Lawsuit which was preceded by his EEO Complaint regarding such). Mr. Bien had worked for the Department of Labor for fifteen years prior to the treatment complained of herein, and he was the agency's expert, lauded for his expertise both inside and outside of the Directorate of Technical Support (See. Plaintiff's Exhibits 1, 2, & 3). In fact, he is the recognized "guru" of industrial hygiene in the United States (Mr. Woodcock's testimony). How does a twenty-three year (23) stellar expert employee suddenly become an unproductive, problem, employee immediately following his EEO Complaint? That occurs when discrimination exist in the form of retaliation.

Respectfully submitted,

Signature on Original
Rickey Nelson Jones
Law Offices of Rickey Nelson Jones, Esq.[1]
RWD Building Suite 400
10480 Little Patuxent Parkway
Columbia, Maryland 21044
D.C. Bar #: MD 12088

Attorney for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 23rd day of July, 1999, "Plaintiff's Findings of Fact and Conclusions of Law" was mailed first class, postage prepaid, to **Alexander D. Shoaibi,** Assistant United States Attorney, Attorney for Defendant, 555 4th Street, N.W., 10th Floor, Judiciary Center Bldg., Washington, D.C. 20001.

Signature on Original
Rickey Nelson Jones

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[1] All attorney's fees incurred by Plaintiff to date are attached as Exhibit "B."

Attorney for Plaintiff

*****EXHIBIT B*****

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

CHING-TSEN BIEN	*	
	*	
Plaintiff,	*	
	*	
v.	*	**Civil Action No.:**
	*	**97- 0572 (AK)**
	*	
CYNTHIA A. METZLER/ HERMAN	*	
	*	
	*	
	*	
Defendant.	*	

* *

ATTORNEY'S FEES INCURRED DUE TO DEFENDANT'S DISCRIMINATORY RETALIATION

Period of March 1997 to December 1997

Legal Services Rendered In The Form

Of [a] Discovery, [b] various consultations with client, [c] Plaintiff's Deposition, [d] meetings with witnesses, [e] Initial Hearing with Judge Greene, [f] preparation of Rule 26 Documents, etc.

$12,000.00

Period of January 1998 to December 1998

Legal Services Rendered In The Form Of [a] Continued Discovery & Discovery Disputes/Motions, [b] various consultations with client, [c] Pretrial Conference, [d] various Motions and Responses to Motions, [e] Conferring with Opposing Counsel, [f] Trial Preparation, etc.

$23,000.00

Period of January 1999 to June 1999 (excluding Trial)

Legal Services Rendered In The Form Of [a] Pretrial Motions, [b] Trial Preparation, [c] various meetings with client, [d] witnesses conferences, [e] Pretrial Hearings, [f] Pretrial Responses to Motions, etc.

$6,000.00

Period of June 1999 (Including Trial) to Present

Legal Services Rendered In The Form Of [a] Pre-Trial Conference, [b] Pre-Trial Telephone Hearing, [c] Response to Various Last Minute Motions, and [d] Trial

$9,613.76

TOTAL LEGAL FEES ARE.....$50,613.76

MORE DETAILED DOCUMENTATION OF REPRESENTATION IS AVAILABLE UPON REQUEST OF COURT.

Respectfully submitted,

Signature on Original
Rickey Nelson Jones
Law Offices of Rickey Nelson Jones, Esq.
RWD Building — Suite 400

10480 Little Patuxent
Parkway
Columbia, Maryland
21044
D.C. Bar #: MD 12088

Attorney for Plaintiff

CERTIFICATE REGARDING
ATTORNEY'S FEES

I HEREBY CERTIFY that the aforegoing accounting of attorney's fees were incurred by the Plaintiff and paid by him.

Signature on Original
Rickey Nelson Jones

Attorney for Plaintiff